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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MINNIE E. NASH, *Petitioner,*

v.

FLORIDA INDUSTRIAL COMMISSION, *et al.*

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 1
QUESTIONS PRESENTED 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 5
SUMMARY OF ARGUMENT 8
ARGUMENT 11
I—FLORIDA'S DISQUALIFICATION OF CLAIMANTS SOLELY BECAUSE THEY FILE CHARGES WITH THE NATIONAL LABOR RELATIONS BOARD CONSTITUTES AN ABRIDGEMENT OF PRIVILEGES OR IMMUNITIES IN VIOLATION OF THE FOURTEENTH AMENDMENT 13
A. Filing a Charge with the National Labor Relations Board Is a "Privilege or Immunity" of National Citizenship 13
B. Disqualification from State Benefits Solely for Exercising a Privilege or Immunity of National Citizenship Constitutes "Abridgement" of that Privilege or Immunity 15
C. The Disqualification Cannot Be Upheld as Serving a Compelling State Interest 18
II—FLORIDA'S DISQUALIFICATION OF CLAIMANTS SOLELY BECAUSE THEY FILE CHARGES WITH THE NATIONAL LABOR RELATIONS BOARD CONTRAVENES THE SUPREMACY CLAUSE 20
CONCLUSION 23

TABLE OF CITATIONS

Cases

Amalgamated Utility Workers *v.* Consolidated Edison Co., 309 U.S. 261 (1940) 21
American Communications Association *v.* Douds, 339 U.S. 382 1950) 18
Braunfield *v.* Brown, 366 U.S. 599 (1961) 18
Building Materials Teamsters *v.* NLRB, 275 F.2d 909 (2d Cir. 1960) 10, 14, 21
Davis *v.* Elmira State Bank, 161 U.S. 275 (1896) 10, 22
Frost *v.* Railroad Commission of California, 271 U.S. 583 (1926) 9, 12, 15

Garrity *v.* New Jersey, 385 U.S. 493 (1967) 12,16
Harman *v.* Forssenius, 380 U.S. 528 (1965) 9, 15
Hill *v.* Florida, 325 U.S. 538 (1945) 11, 23
In re Quarles, 158 U.S. 532 (1895) 8, 14
Lamont *v.* Postmaster General, 381 U.S. 301 (1965) 9, 15
McCulloch *v.* Maryland, 4 Wheat. 316 (1819) 10, 21
NLRB *v.* Gullett Gin Co., 340 U.S. 361 (1951) 9, 19
Sherbert *v.* Verner, 374 U.S. 398 (1963) 9, 16, 18, 20
Slaughter-House Cases, 83 U.S. 36 (1873) 8, 13
Speiser *v.* Randall, 357 U.S. 513 (1958) 9, 16
Sperry *v.* Florida ex rel. Florida Bar, 373 U.S. 379 (1963) 11, 23
Terral *v.* Burke Construction Co., 257 U.S. 529 (1922) 11, 22
Thomas *v.* Collins, 323 U.S. 516 (1945) 19
Twining *v.* New Jersey, 211 U.S. 78 (1908) 14
United Auto Workers *v.* Scofield, 382 U.S. 205 (1965) 20
United States *v.* Georgia Public Service Commission, 371 U.S. 285 1963 .....11, 22
United States *v.* Guest, 383 U.S. 745 (1966) 14
Western Union Telegraph Co. *v.* Kansas, 216 U.S. 1 (1910) 16
Constitution of the United States:
Article VI, Clause 2 .....2, 20
Amendment XIV 2, 13

Statutes

National Labor Relations Act, 29 U.S.C. § 151 et seq.
Generally 14
Section 8(a)(4), 29 U.S.C. § 158(a)(4) 21
Florida Statutes (1965):
Section 443.02 .....3, 11, 19
Section 443.05 4
Section 443.06(4) 4, 5, 11

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Appeals Referee, Florida Industrial Commission (R. 34) is unreported. The *per curiam* decision of the Florida Unemployment Compensation Board of Review (R. 48) is unreported. The decision of the District Court of Appeal of Florida, Third District (R. 58) is reported at 191 So.2d 99.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, the highest state court in which a decision could be had, was entered on October 11, 1966. The time for filing a petition for writ of certiorari with this court was extended by order of Mr. Justice Black to and including February 8, 1967 (R. 60). The petition for writ of certio-

rari was filed in this Court on February 6, 1967, and was granted on April 10, 1967 (R. 61). This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a State which disqualifies an otherwise eligible claimant from unemployment benefits solely because she caused a charge to be filed with the National Labor Relations Board thereby abridges her privileges and immunities of United States citizenship, in contravention of the 14th Amendment, Section 2 of the United States Constitution.

2. Whether, consistent with the supremacy clause, Article VI, clause 2 of the United States Constitution, a State may disqualify an otherwise eligible claimant from unemployment benefits solely because she caused a charge to be filed with the National Labor Relations Board.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

U.S. Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statutes (1965) Section 443.02:

"As a guide to the interpretation and application of this Chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during the periods of employment from which benefits may be paid for period of unemployment thus maintaining purchasing power and limiting the serious social consequences of unemployment. The legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police power of the State, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, subject, however, to the specific provisions of this Chapter."

Florida Statutes (1965) Section 443.05:

"An unemployed individual shall be eligible to receive benefits . . ."

Florida Statutes (1965) Section 443.06(4):

"An individual shall be disqualified for benefits:

. . . .

(4) For any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed; provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that:

(a) He is not participating in or financing, or directly interested in the labor dispute which is in active progress; provided, however, that the payment of regular union dues shall not be construed as financing a labor dispute within the meaning of this section; and

(b) He does not belong to a grade or class of workers of which immediately before the commencement of the labor dispute there were members employed at the premises at which the labor dispute occurs any of whom are participating in, or financing, or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, or are conducted in separate departments of the same premises, each department shall, for the purpose of this subsection be deemed to be a separate factory, establishment or other premises."

STATEMENT OF THE CASE

Petitioner, Minnie Nash, is a 54-year old woman who first went to work for respondent Stanley Building Specialties Co. ("the Company") in 1961 or 1962 (R. 14). The employees of the Company were represented in collective bargaining by United Steelworkers of America ("the Union"), and the latest collective bargaining agreement expired on January 30, 1965 (R. 11). On January 31, 1965, when negotiations for a new agreement reached an impasse, the employees struck (R. 12). Petitioner was an active participant in the strike (R. 12).

On March 30, 1965, the Union advised the Company that the strikers were willing to return to work (R. 12). The Company agreed to take back some of the strikers, including petitioner, and petitioner actually resumed her employment on April 14, 1965 (R. 12, 15). Petitioner made no claim for unemployment benefits covering the period of the strike.

Following her return, petitioner worked from April 14, 1965 through May 16, 1965 (R. 15). On the latter date, she was laid off. The Company gave, as the reason for the layoff, "slow production", i.e., insufficient work to warrant petitioner's retention (R. 13). Petitioner promptly filed an application for unemployment benefits (R. 1), and actually received benefits covering the period from May 16, 1955 through October 5, 1965, the date she was recalled to work by the Company (R. 18, 20, 22). However, on November 15, 1965 she received notice from the Chief of Benefits, Florida Industrial Commission, declaring that her entitlement had been redetermined and that under Section 443.06(4) of the Florida Unemployment Compensation Law she was disqualified for the entire year 1965 because engaged in a "labor dispute" (R. 3). Section 443.06(4) provides in pertinent part:

> An individual shall be disqualified for benefits . . .

> (4) For any week with respect to which the Commission finds that his . . . unemployment is due to a labor dispute in active progress which exists at the factory . . . at which he is or was last employed . . .

Petitioner filed a timely appeal from this disqualification (R. 5), and a hearing was set before an Appeals Referee of the Florida Industrial Commission (R. 8). At the hearing, it was stipulated that on June 17, 1965, petitioner had caused her Union to file a charge with the National Labor Relations Board alleging that her layoff by the Company in May, 1965 was motivated by her Union activities (R. 13). It was further stipulated that that charge remained pending throughout the remainder of her period of layoff (R. 13). Petitioner argued at the hearing that to disqualify her solely because she had caused the NLRB charge to be filed would unconstitutionally abridge her privileges and immunities and would violate the supremacy clause of the federal constitution (R. 23-24).

The Appeals Referee ruled that petitioner was entitled to benefits from May 6 (the date of her layoff) until June 17 (the date the NLRB charges were filed), but that she was properly disqualified for the period between June 17 and October 5 (the date of her recall). The Referee reasoned as follows (R. 38-39):

> "The testimony presented in this instance shows that on June 17, 1965, appellant filed charges with the National Labor Relations Board against the employer because of her separation on May 16, 1965, seeking, among other things, reinstatement on her job and back pay for time which she had lost from work. It has further been shown that these charges were unresolved and pending when claimant was recalled to work by the employer, voluntarily, on October 5, 1965. These charges being filed and being unresolved and pending as of the date appellant returned to work constitute a

labor dispute in active progress at the premises at which she was last employed between claimant and the employer. Consequently, here, it should be deemed that any unemployment appellant experienced during the period beginning June 17, 1965, to October 5, 1965, is due to a labor dispute in active progress at the premises at which she was last employed and she participated in such dispute. Therefore it should be held that appellant is disqualified for benefits for the period beginning June 17, 1965 to October 5, 1965.

"As appellant was separated from her job on May 16, 1965, due to 'slow production' and did not dispute such separation until June 17, 1965, it should be held that she is qualified for benefits for all periods for which she filed claims beginning May 16, 1965 to June 17, 1965."[1a]

Petitioner appealed to the Board of Review, Florida Industrial Commission, on the grounds, *inter alia*, that the disqualification for filing a charge with the NLRB unconstitutionally abridged her privileges and immunities, as well as the supremacy clause (R. 41-42). The Board of Review affirmed without opinion (R. 48).

Petitioner then filed a petition for writ of certriorari in

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[1] The decision of the Appeals Referee contains a number of other holdings, which are not involved on this appeal, but which may be briefly summarized:

(1) Petitioner was not eligible for benefits between January 31 and April 14, 1965, because of her active participation in the strike (R. 38). (This holding was gratuitous, for petitioner had never claimed benefits for this period.)

(2) Petitioner was not disqualified between May 16 and June 17, 1965, even though the Union had filed charges with the NLRB on behalf of employees other than petitioner (i.e. those who were not reinstated after the strike), because petitioner's unemployment "was not due to this dispute" (R. 39).

(3) Petitioner was eligible for benefits beginning December 17, 1965, when her unemployment was due to a plant shutdown (R. 39).

the District Court of Appeal of Florida, Third District, again asserting the unconstitutionality of the disqualification (R. 49-50). The petition was denied without opinion (R. 58-59). This being the highest State court in which a decision could be had, petitioner filed her petition in this court.

SUMMARY OF ARGUMENT

Florida has declared that claimants forfeit their right to receive unemployment benefits if they file charges with the National Labor Relations Board challenging the legality of their layoff or discharge. This rule confronts employees with "a choice between the rock and the whirlpool". They must sacrifice either their claims to the NLRB, or their receipt of unemployment benefits. Since few employees can afford to sacrifice the immediate receipt of unemployment benefits for the speculative and distant prospect of receiving backpay should their NLRB charge ultimately be sustained, the likely consequence of Florida's rule will be substantial curtailment of the operation of the National Labor Relations Act in Florida.

Florida's rule unconstitutionally abridges the interests both of affected employees and of the Federal Government. We consider the impact on each.

I. Florida's Rule Abridges the Privileges or Immunities of Affected Employees.

The filing of charges with the NLRB falls within that limited group of privileges or immunities of *national* citizenship protected by the Fourteenth Amendment against State abridgement. It is a means both of informing the Federal Government of a violation of its laws, *In re Quarles,* 158 U.S. 532, 536 (1895), and of seeking the Federal Government's protection, *Slaughter-House Cases,* 83 U.S. 36, 79 (1873).

While Florida has not made it a crime to file charges with the NLRB, nor imposed a tax upon the act of filing such charges, its disqualification of claimants from unemployment benefits is just as effective a deterrent. The Constitution nullifies indirect, as well as direct, interference with the exercise of Constitutional rights. *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963); *Harman* v. *Forssenius,* 380 U.S. 528, 540-41 (1965); *Lamont* v. *Postmaster General,* 381 U.S. 301, 307 (1965). Nor does it matter that the particular method used to nullify the Constitutional right is the withholding of a "privilege" granted by the State to its citizens. It is well established that a state may not condition enjoyment of a privilege upon forbearance from exercising rights guaranteed by the Federal Constitution. *Frost* v. *Railroad Commission of California,* 271 U.S. 583, 593-94 (1926); *Speiser* v. *Randall,* 357 U.S. 513, 518-19 (1958). This principle has been applied to the very "privilege" involved here: receipt of unemployment benefits. *Sherbert* v. *Verner,* 374 U.S. 398, 403-04 (1963).

No compelling state interest justifies the interference with Constitutional rights involved here. Florida's failure to claim any such overriding interest is dispositive, for this Court is "unwilling to assess the importance of an asserted state interest without the views of the state court", *Sherbert* v. *Verner, supra,* at 407. The Company, but not the State, has sought to justify the disqualification as designed to prevent double recoveries, i.e. from both the State and the NLRB. This reasoning would not validate the rule, even if the State were belatedly to embrace it. The State is entitled to recoup unemployment benefits already paid if an employee ultimately recovers backpay from the NLRB, *NLRB* v. *Gullett Gin Co.,* 340 U.S. 361, 365 n.1 (1951). The availability of that procedure amply protects any state interest in avoiding duplicate payments. Moreover, the effect of Florida's rule is to deny unemployment benefits even if the employee loses before the NLRB, and even the Company

has not ventured a theory as to how that consequence vindicates a compelling state interest.

Florida's rule deters the exercise of rights guaranteed by the Federal Constitution, and is not saved by any overriding state interest. It follows that the disqualification of petitioner was unconstitutional.

II. Florida's Rule Contravenes the Supremacy Clause

The National Labor Relations Act depends, for its enforcement, upon the filing of charges by private persons. "[T]he Board, unlike many other Federal regulatory agencies, [is] limited by §10(b) of the Act to the prosecution of violations brought to its attention by aggrieved parties . . ." *Building Material Teamsters* v. *NLRB,* 275 F.2d 909, 913 (2d Cir. 1960). Anything which deters persons from filing charges prevents the NLRB from performing its functions and frustrates enforcement of the NLRA. Because aggrieved employees cannot afford to pay Florida's "price" for filing NLRB charges, flagrant violations of the Act are likely to go unchallenged and unremedied.

Florida may not thus shackle the operations of a Federal agency and the enforcement of a Federal law. The supremacy clause deprives the states of power "to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government". *McCulloch* v. *Maryland,* 4 Wheat. 316, 436 (1819). State laws are "void" which "frustrate the purpose of the national legislation, or impair the efficiency of those agencies of the Federal Government to discharge the duties for the performance of which they were created". *Davis* v. *Elmira State Bank,* 161 U.S. 275, 283 (1896).

The supremacy clause prohibits not only State action directed at the Federal instrumentalities themselves, but also State action directed at private persons which has the effect of disrupting the operations of Federal instrumental-

ities. See, e.g., *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922) (state law penalizing corporations which invoked the diversity jurisdiction of the Federal courts); *United States* v. *Georgia Public Service Comm'n*, 371 U.S. 285 (1963) (state law penalizing carriers who contracted to supply services to Federal agencies at rates below State-prescribed minima); *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379 (1963) (state injunction against non-lawyers practicing before the Patent Office).

Since the disqualification here, although directed at individuals, interferes with the operations of a Federal agency and the enforcement of a Federal statute, it contravenes the supremacy clause. As in *Hill* v. *Florida*, 325 U.S. 538, 542-43 (1945):

> "[T]he 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that [the Florida statute] as applied here 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'."

ARGUMENT

Florida has established a program to provide benefits to those "unemployed through no fault of their own", Florida Statutes (1965) Sec. 443.02, but disqualifies those whose unemployment is "due to a labor dispute", *Id. Sec.* 443.06(4). In these respects, Florida's practice is identical to that of each of the 50 states. Alone among the states, however, Florida has fashioned a rule, applied in this case, that the filing of a charge with the NLRB is itself a "labor dispute", and disqualifies employees from unemployment benefits solely because they have invoked the aid of the Federal Government.

Petitioner was laid off ostensibly because of "slow production", and she began to receive unemployment benefits. A month after the layoff began, petitioner filed charges with the NLRB alleging that she was actually laid off because of her Union allegiance. Florida, declaring that the NLRB charge "constitute[s] a labor dispute" (R. 38), thereupon disqualified her from receiving further benefits.

The Florida rule confronts employees who believe they have been laid off or discharged illegally with "a choice between the rock and the whirlpool." *Frost* v. *Railroad Commission of California*, 271 U.S. 583, 593 (1926); *Garrity* v. *New Jersey*, 385 U.S. 493, 498 (1967). Only by remaining silent, and foregoing assertion of their claims to the NLRB, will they receive unemployment benefits. (Here, for example, petitioner received benefits for the first month of her layoff, because she "did not dispute [her] separation until June 17" (R. 39)). But if they file a charge with the NLRB protesting the legality of their layoff (or discharge) they will be summarily disqualified from unemployment benefits.

If the Florida rule is permitted to continue, it is not hard to foresee the probable consequences. Few employees can afford to sacrifice the assured, and immediate, receipt of unemployment benefits for the speculative, and in any event distant, prospect of receiving backpay should their NLRB charge ultimately be sustained. Therefore, unemployed workers with legitimate grievances are not going to file NLRB charges; employers will be able to violate the National Labor Relations Act with relative impunity; and the public interests which inhere in the NLRA will not be served. It is no exaggeration to say that the Florida rule, unless reversed, will seriously curtail the operation of the National Labor Relations Act in Florida.

We believe the Florida rule unconstitutionally abridges the interests both of the affected employees and of the Federal Government. As we show in Part I herein, the rule abridges employees' privileges and immunities of national

citizenship, by imposing an unlawful condition on the exercise of such privileges and immunities. And, as we show in Part II, the rule, by its resultant interference with the administration of the National Labor Relations Act, runs afoul of the supremacy clause.

I—FLORIDA'S DISQUALIFICATION OF CLAIMANTS SOLELY BECAUSE THEY FILE CHARGES WITH THE NATIONAL LABOR RELATIONS BOARD CONSTITUTES AN ABRIDGEMENT OF PRIVILEGES OR IMMUNITIES IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. Filing A Charge With the National Labor Relations Board Is a "Privilege or Immunity" of National Citizenship.

The Fourteenth Amendment declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This clause has been sparingly applied, due to an early holding that it is inapplicable to those privileges and immunities which arise from *State* citizenship. *Slaughter-House Cases,* 83 U.S. 36 (1873). Nevertheless, it is clear that the filing of charges with the NLRB falls within that limited group of privileges or immunities of *national* citizenship which have always been recognized as protected by the clause.

In *Slaughter-House Cases, supra,* it was declared that the Fourteenth Amendment protects against State abridgement those privileges and immunities "which owe their existence to the Federal Government, its national character, its Constitution, or its laws." 83 U.S. at 79. The Court's enumeration of privileges and immunities protected by the Fourteenth Amendment included "the right . . . to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, . . . to engage in administering its functions" *Ibid.*

Thereafter, in *In re Quarles,* 158 U.S. 532 (1895), the Court squarely held that one of the privileges or immunities of national citizenship is the right to inform the United States authorities of violations of its laws:

> "The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. *Logan* v. *United States,* 144 U.S. 294. Both are, within the concise definition of the Chief Justice in an earlier case, 'privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States.' . . ." 158 U.S. at 536.

See also, *Twining* v. *New Jersey,* 211 U.S. 78, 97 (1908); *United States* v. *Guest,* 383 U.S. 745, 771-72 (1966) (opinion of Mr. Justice Harlan, concurring in part and dissenting in part).

Clearly, the filing of charges with the National Labor Relations Board, alleging that an employer has violated the National Labor Relations Act, is a privilege or immunity of national citizenship. It is a means both of informing the Federal Government of a violation of its laws, *In re Quarles, supra,* and of seeking the Federal Government's protection, *Slaughter-House Cases, supra.* Moreover, since the NLRB may not initiate its own proceedings, and is dependent upon the filing of charges by private persons,[2] the person who files such charges is in a real sense "engaged in administering its functions," *Slaughter-House Cases, supra.*

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[2]"[T]he Board, unlike many other Federal regulatory agencies [is] limited by § 10(b) of the Act to the prosecution of violations brought to its attention by aggrieved parties . . ." *Building Material Teamsters* v. *NLRB,* 275 F.2d 909, 913 (2d Cir. 1960) (Friendly, J.).

B. Disqualification from State Benefits Solely for Exercising a Privilege or Immunity of National Citizenship Constitutes "Abridgement" of that Privilege or Immunity.

Florida has not made it a crime to file charges with the NLRB, nor has it imposed a direct tax upon the act of filing such a charge. But its disqualification of claimants from unemployment benefits will be just as effective in deterring the filing of charges. The Constitution "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed," *Harman* v. *Forssenius,* 380 U.S. 528, 540-41 (1965). Indirect exactions "almost certain to have a deterrent effect" on the exercise of Constitutional rights are forbidden. *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965). The disqualification imposed by Florida here is a form of indirect interference with the exercise of Constitutional rights falling within this prohibited category.

We may assume that Florida is free to adopt, or not to adopt, a system of unemployment benefits, as it chooses, and that receipt of unemployment benefits is a "privilege" which the State is not constitutionally required to provide. Nevertheless, it is well settled that the State may not condition enjoyment of that privilege upon forbearance from exercising a right guaranteed by the Federal Constitution. *Frost* v. *Railroad Commission of California,* 271 U.S. 583, 593-94 (1926):

> "It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees

> embedded in the Constitution of the United States may thus be manipulated out of existence."

This Court has applied this principle in a number of settings. For example, in *Speiser* v. *Randall,* 357 U.S. 513 (1958), the State had conditioned receipt of a tax exemption upon the signing of an oath that the taxpayer had not exercised certain First Amendment rights. This Court struck down utilization of the oath as a condition to receipt of the tax exemption, declaring:

> "The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech . . . [T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." 357 U.S. at 518-19.

See also, *Western Union Telegraph Co.* v. *Kansas,* 216 U.S. 1 (1910); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), and cases cited therein at p. 500.

Indeed, in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), this Court applied this constitutional principle to the very "privilege" involved here: receipt of unemployment benefits. South Carolina administered its unemployment system to disqualify those unavailable for Saturday work. The effect of this rule was to disqualify automatically those who, for religious reasons, would not work on Saturdays. This Court struck down the rule as an unconstitutional burden on the free exercise of religion by Sabbatarians:

> "We first turn to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it clear that it does. In a sense the consequences of such a disqualification to religious practices and principles may be only an indirect result of welfare legislation within the

State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '[i]f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect' . . . Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine . . .

"Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment benefits are not appellant's 'right' but merely a 'privilege'. It is too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege [citing cases]." 374 U.S. at 403-04.

It should be apparent that the abridgement in the instant case is far more direct than that in *Sherbert*. South Carolina's disqualification was not aimed at Sabattarians; it was a general rule disqualifying those who turned down available employment. The vice in South Carolina's rule was that it was so broad as to include Sabbatarians in its sweep. Here, by contrast, the Florida rule is directed specifically at the filing of charges with the NLRB. *A fortiori*, the holding in *Sherbert* is applicable to Florida's rule here.

There can be no doubt that the effect of Florida's rule is to deter the filing of charges with the NLRB. It follows

that the rule abridges privileges or immunities of national citizenship.

C. The Disqualification Cannot Be Upheld as Serving a Compelling State Interest.

This Court has recognized that, in certain circumstances, state laws interfering with the exercise of constitutional rights may be upheld as serving compelling state interests. See, e.g., *Braunfield* v. *Brown,* 366 U.S. 599 (1961). We question, however, whether that principle can ever be applicable to the constitutional right to communicate with the Federal Government. We would think that the very essence of the principles inherent in the supremacy clause is that state interests, no matter how compelling, must bow to the unimpeded administration of Federal laws. In any event, it is clear that no compelling state interest justifies the Florida rule involved here, even if there is room for application of that principle to this type of Constitutional right.

At the outset, we note that at no point in the course of this litigation has the State suggested that there is a compelling interest which justifies interference with petitioner's constitutional rights. The absence of any such claim or ruling below is dispositive, for this Court has declared itself "unwilling to assess the importance of an asserted state interest without the views of the state court." *Sherbert* v. *Verner,* 374 U.S. 398, 407 (1963).

Nor can we conceive of any state interest which might be advanced as compelling. Whatever its views on the desirability of employees filing charges with the NLRB, the State may not defend its rule as "frankly aimed at the suppression of dangerous ideas" cf. *American Communications Association* v. *Douds,* 339 U.S. 382, 402 (1950), yet suppression, whether or not intended, appears to be the only significant consequence of the rule.

The Company, but not the State, has sought to justify the disqualification as designed to prevent double recoveries

(R. 27). It argues that an employee who receives unemployment benefits, and then wins a backpay award from the NLRB, is paid twice for the same period of unemployment (*Ibid*). This reasoning would not validate the rule, even if the State were belatedly to embrace it. This Court has recognized the right of the State to recoup unemployment benefits already paid if an employee ultimately recovers backpay from the NLRB, *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365 n.1 (1951), and the availability of that procedure amply protects any state interest in avoiding duplicative payments. While, to be sure, it is somewhat more cumbersome to recoup payments than to deny them altogether, this slight inconvenience is not in the class of "gravest abuses, endangering paramount interests" warranting infringement of constitutional rights. *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *Sherbert* v. *Verner, supra*, 374 U.S. at 406-07.

Here, Florida denies unemployment benefits without regard to whether the claimant ultimately wins or loses before the NLRB. Thus, the claimant may wind up with no recovery at all, and even the Company has not ventured a theory as to how that consequence vindicates a compelling state interest.[4]

Moreover, Florida has demonstrated that it does not con-

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[4] The same constitutional defect would inhere, however, even if the Florida rule were more sophisticated. Thus, if Florida announced that it would *suspend* the payment of benefits, and pay them only if the claimant lost before the NLRB, the danger of non-recovery would be averted. But the infringement on constitutional rights would be the same. The whole purpose of unemployment benefits is to compensate *during the period of unemployment* (see Florida Statutes (1965), Sec. 443.02). Suspension of benefits would be as effective as outright denial in deterring the filing of NLRB charges, for the unemployed cannot afford to postpone the receipt of benefits.

In short, the recoupment procedure authorized in *Gullet Gin* adequately protects any state interest in preventing double recovery, and accordingly no infringement upon constitutional rights can be excused on the ground that it is designed to prevent double recovery.

sider the danger of double recovery worthy of concern. In the sixteen years since *Gullet Gin* was decided, Florida has adopted no procedure for recoupment of benefits paid to those ultimately receiving backpay from the NLRB,[5] although expressly authorized by this Court to do so, 340 U.S. at 365 n.1. It should be apparent that the incidences of double recovery are so few, when compared to the magnitude of the State unemployment system, as to be *de minimis*, cf. *Sherbert* v. *Verner*, 374 U.S. at 407-08, and Florida has so regarded them.

It follows that the disqualification of petitioner abridged her privileges and immunities of national citizenship, and that the Florida rule must be declared unconstitutional.

II—FLORIDA'S DISQUALIFICATION OF CLAIMANTS SOLELY BECAUSE THEY FILE CHARGES WITH THE NATIONAL LABOR RELATIONS BOARD CONTRAVENES THE SUPREMACY CLAUSE.

Thus far, we have examined the Florida rule from the standpoint of its impact upon employees, and we have shown that it unconstitutionally abridges their privileges and immunities. We now discuss the impact of the rule upon the operations of the Federal Government itself. We shall show that, because the rule seriously disrupts the operations of a Federal administrative agency and the enforcement of a Federal law, it runs afoul of the supremacy clause, Article VI, Clause 2 of the Federal Constitution.

The National Labor Relations Act depends, for its enforcement, upon the filing of charges by private persons. "The statutory machinery begins with the filing of an unfair labor practice charge by a private person", *United Auto Workers* v. *Scofield*, 382 U.S. 205, 219 (1965). "[T]he Board, unlike many other Federal regulatory agencies, [is]

[5] See Florida Statutes (1965), Sec. 443.07(6), listing the only situations in which recoupment is allowed. Recovery of backpay from the NLRB is not included in the list.

limited by §10(b) of the Act to the prosecution of violations brought to its attention by aggrieved parties . . ." *Building Material Teamsters* v. *NLRB*, 275 F.2d 909, 913 (2d Cir. 1960) (Friendly, J.). Congress' concern that persons not be deterred from filing charges is reflected in Section 8(a)(4) of the Act, 29 U.S.C. §158(a)(4), which makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges . . ."

The NLRB is "a public agency acting in the public interest", *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265 (1940). Anything which deters persons from filing charges prevents the NLRB from performing its functions and frustrates enforcement of the NLRA. Because aggrieved employees cannot afford to pay Florida's "price" for filing NLRB charges, flagrant violations of the Act are likely to go unchallenged and unremedied.

Florida may not thus shackle the operations of a Federal agency and the enforcement of a Federal law. The governing principle was first enunciated by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat, 316, 436 (1819):

> "[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

The fate of State action interfering with the Federal Government's operations was decreed in *McCulloch* at 427:

> "It is of the very essence of supremacy to remove all obstacles to its action within its sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."

The freedom of Federal agencies and Federal legislation from State interference was restated with undiminished vigor in *Davis* v. *Elmira State Bank*, 161 U.S. 275. 283 (1896):

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either *frustrates the purpose of the national legislation, or impairs the efficiency of those agencies of the Federal government to discharge the duties for the performance of which they were created.* These principles are axiomatic, and are sanctioned by the repeated adjudications of this court" (Emphasis supplied).

These early "supremacy" decisions involved State action directed against the Federal instrumentalities themselves, while our case involves State action directed against private persons. This Court has recognized, however, that the operations of the Federal Government may be shackled by State action directed at private persons. Where the Federal Government has prescribed a role for private persons in the effectuation of a Federal function, and a State attempts to deter persons from performing that function, the State's action has been struck down as contravening the supremacy clause. For example, this Court has nullified, under the supremacy clause, an Arkansas statute penalizing corporations which invoked the diversity jurisdiction of the Federal courts, *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922); a Georgia law penalizing carriers who contracted to supply services to Federal agencies at rates below State-prescribed minima, *United States* v. *Georgia Public Service*

Comm'n, 371 U.S. 285 (1963); and a Florida law enjoining non-lawyers from practicing before the Patent Office, *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).

Since the disqualification here, although directed at individuals, interferes with the operations of a Federal agency and the enforcement of a Federal statute, it contravenes the supremacy clause. As this Court said in *Hill* v. *Florida*, 325 U.S. 538, 542-43 (1945), with respect to another Florida statute found to undermine the National Labor Relations Act:

> "[T]he 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that [the Florida statute] as applied here 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' . . .
>
> "Our holding is that the NLRA and . . . the Florida Act as here applied cannot 'move freely within the orbits of their respective purposes without impinging upon one another.' Accordingly the case is reversed

CONCLUSION

For the reasons set forth hereinabove, Florida's disqualification of petitioner from receipt of unemployment benefits, solely because she caused a charge to be filed with the National Labor Relations Board, unconstitutionally abridges

her privileges and immunities of national citizenship, and contravenes the supremacy clause. Accordingly, the decision below must be reversed.

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